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The Ermine and Woolsack: Disciplinary Proceedings Involving Judges, Attorney-Magistrates, and Other Judicial Figures

DAVID CLEVELAND* AND JASON MASIMORE**

The idea that the judicial office is supposed to be invested with ermine, though fabulous and mythical, is yet most eloquent in significance. We are told that the little creature called the ermine, is so acutely sensitive as to its own cleanliness, that it becomes paralyzed and powerless at the slightest touch of defilement upon its snow-white fur And a like sensibility should belong to him who comes to exercise the august functions of a judge. It is his exalted province to pronounce upon the rights of life, liberty, and property, to make the law respected and amiable in the sight of the people; to dignify that department of the government upon which, more than all others depend the peace, the happiness, and the security of the people. But when once this great office becomes corrupted, when its judgments come to reflect the passions or the interest of the magistrate rather than the mandates of the law, the courts have ceased to be the conservators of the common weal, and the law itself is debauched into a prostrate and nerveless mockery.

Harrison v. Wisdom,
54 Tenn. (7 Heisk.) 99 (1872)

In the Middle Ages, the wool trade was the main source of commercial wealth in England, and tradition has it that the woolsack was introduced in the House of Lords to symbolize the importance of wool in the commerce of the realm. Royal officials attending Parliament were entitled to sit on a woolsack and the Lord Chancellor, who enjoyed precedence over all peers except a prince royal, sat on the woolsack nearest the throne. In time, it became customary for the Lord Chancellor to sit on the woolsack when he delivered judgment in the Court of Chancery.

C. Ray Miles Const. Co., Inc. v. Weaver,
373 S.E.2d 905, 906 (S.C. App. 1988)

INTRODUCTION

The modern legal system is comprised of a discrete class of professional lawyers and judges. Lawyers and judges are drawn from the same lot of individuals, and the ethical obligations of both groups overlap. However, because

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our sense of professional ethics is also role-based, lawyers and judges often face different ethical obligations. While lawyers are viewed as functional elements in the orderly administration of justice, judges are often equated with justice itself, and they are therefore often held to a higher standard.¹ "A judge increases his stature by . . . the extent to which he squares his conduct with approved moral and professional standards. The public has a right to expect that of him and if he does not choose to impose such a standard on himself he should not accept judicial appointment."²

This Note begins in Part I by introducing and explaining how a large measure of our system of legal ethics is determined based on the role of actors within the system. Parts II and III present general overviews of the discipline system of lawyers and judges, respectively. Part IV presents an in-depth examination of some of the jurisdictional problems encountered when individuals switch roles in the midst of the legal and ethical system and looks into the various ways courts can deal with disciplining those who have switched roles. Section A of Part IV examines disciplinary measures for judicial candidates. Section B examines jurisdictions that deny jurisdiction to attorney disciplinary bodies over prior acts of sitting judges. Section C examines arguments made for allowing attorney disciplinary bodies to oversee attorney-conduct, even if it means jurisdiction over a sitting judge for pre-bench behavior. Section D concludes Part IV by examining the disciplining of former judges that they might not escape scrutiny simply by announcing retirement. Part V lays out the disciplinary measures available to non-attorneys on the bench or those in judicial-like positions.

I. INTRODUCTION TO THE CONCEPT OF ROLE-BASED ETHICS

"To a significant degree, our concept of a code of judicial ethics is shaped by our notion of the role of those it regulates."³ Similarly, our expectation as to the behavior of lawyers is role-based.⁴ The *Judicial Code* espouses a standard of conduct in which each judge is charged with preserving the integrity and

1. As suggested in the title, the ermine and wooolsack represent this higher standard by identifying the required purity and the inherent importance of the judiciary. "When a lawyer dons the ermine and mounts the wooolsack he assumes a very serious obligation to the people he serves. Nothing more seriously affects their lives, their property and their safety than his decisions, the weight of which is determined by his wisdom and integrity. The ermine is the symbol of purity, honor and wisdom, that brand of wisdom which is the flower of years and experience. From the time he is clothed with judicial authority he is a marked man. His words and his conduct should inspire confidence; he might well strive to honor the bench instead of having it honor him. The judiciary is the capstone of our democracy but it will be so no longer than its deportment warrants." *Cone v. Cone*, 68 So.2d 886, 887-88 (Fla. 1953).

2. *Id.* at 888.

3. Irving R. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW AND CONTEMP. PROB. 3, 3 (1970).

4. MODEL RULES OF PROFESSIONAL CONDUCT preamble (1983) [hereinafter MODEL RULES].

independence of the judiciary.⁵ In regard to lawyers' obligations, the *Model Rules* sets out its own role-based approach; "Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system."⁶

The most pertinent difference between the *Model Rules of Professional Conduct* and the *Code of Judicial Conduct* is breadth. The role of the lawyer, and therefore the system of rules that applies, focuses on the lawyer's duty within the legal system.⁷ That is, a lawyer's conduct is generally regulated only in regard to that lawyer's specific contact with the legal system. In contrast, the judge's role includes behavior both as a professional and as a human being.⁸ This divergence in the breadth of the perceived roles of judges and lawyers has created differing codes of conduct for each group. The *Model Rules* emphasize the lawyer's differing roles within the system by addressing such issues as the fundamental lawyer-client relationship,⁹ the lawyer as a counselor,¹⁰ the lawyer as an advocate,¹¹ transactions with non-clients,¹² participation in law firms and associations,¹³ public service,¹⁴ allowable rendering of legal services,¹⁵ and maintaining the integrity of the profession.¹⁶ In comparison, the *Judicial Code* emphasizes a judge's personal life (commonly called "off-the-bench behavior"). Such concerns include maintaining the integrity of the profession,¹⁷ avoiding impropriety and the appearance of impropriety,¹⁸ proper performance of judicial duties,¹⁹ quasi-judicial and extra-judicial activities,²⁰ allowable compensation for quasi-judicial and extra-judicial activities,²¹ and political activities.²² As other

5. CODE OF JUDICIAL CONDUCT Canon 1 (1973) [hereinafter JUDICIAL CODE]. The Reporter's Notes to the *Code of Judicial Conduct* explain that Canon 1 expresses the underlying philosophy of the *Code*. E.W. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 49 (1973).

6. MODEL RULES OF PROF'L CONDUCT preamble, cmt. 12.

7. As a representative of a client, a lawyer's role may be that of an advisor, advocate and negotiator. MODEL RULES preamble, cmt 2. Lawyers also serve as intermediates and evaluators. *Id.* Finally, a lawyer must acknowledge his or her status as both a member of the public citizenry and as a member of a learned profession. *Id.* at cmt. 5.

8. "The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law." JUDICIAL CODE preamble, cmt. 1 (1990).

9. MODEL RULES Rule 1.

10. MODEL RULES Rule 2.

11. MODEL RULES Rule 3.

12. MODEL RULES Rule 4.

13. MODEL RULES Rule 5.

14. MODEL RULES Rule 6.

15. MODEL RULES Rule 7.

16. MODEL RULES Rule 8.

17. JUDICIAL CODE Canon 1.

18. JUDICIAL CODE Canon 2.

19. JUDICIAL CODE Canon 3.

20. JUDICIAL CODE Canon 4.

21. JUDICIAL CODE Canon 4.

22. JUDICIAL CODE Canon 5.

observers of this dichotomy have noted, “[I]t is striking that only Chapter 8 of the *Model Rules* deals with the conduct of lawyers outside of their role as lawyers, while only Canon 3 of the *Judicial Code* deals solely with a judge’s conduct as a judge.”²³

This divergence between what is expected of judges and what is expected of lawyers attests to the different roles these professions play in our legal system.²⁴ “[T]he lawyer serves the justice system as a conduit between the laity and the institution.”²⁵ Lawyers operate as tools or parts of the entire self-governing legal machinery, and are therefore best regulated on this level. In contrast, judges serve both a functional purpose and an abstract purpose.²⁶ “Judges are the embodiment of the judicial system and as such their conduct, even extra-judicial conduct, is much more likely to effect the public’s perception of the judicial system.”²⁷ Hence, a system for regulating the behavior of judges must be broader than the system for lawyers. Thus, while the reputation of lawyers may have some effect on the public perception of justice, the public’s belief in ethical and impartial judges is much more fundamental to a public sense of fair justice and equity.²⁸

23. Brian Holland, *The Code of Judicial Conduct and the Model Rules of Professional Conduct: A Comparison of Ethical Codes for Judges and Lawyers*, 2 Geo. J. Legal Ethics 725, 733 (1989). See also MODEL RULES Rule 8.2(b), which simply urges lawyers who are candidates for judicial office to comply with Canon 5 of the *Judicial Code* governing candidacies for judicial office.

24. The Preamble to the *Judicial Code* states, “Intrinsic to all sections of this *Code* are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.” JUDICIAL CODE preamble, cmt. 1. Thus, a judge’s charge to remain a highly visible symbol necessitates an emphasis by the *Code* on the off-bench life of such a person. In contrast, a lawyer’s role is not that of a symbol, but rather as protector of the self-governing aspects of the legal profession.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated [A]buse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice. The legal profession’s relative autonomy carries with it special responsibilities of self-government [A] lawyer should also aid in securing their observance by other lawyers. . . . [N]eglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

MODEL RULES preamble, cmt. 9-11.

25. Holland, *supra* n. 23, at 733.

26. See *supra* note 8 and accompanying text.

27. MODEL RULE Introduction to Article 10 (Discussion Draft 1980).

28. “Many Americans perceive the courts not only as honorable and fair, but also as important guardians of property and person in an increasingly large, diverse, and often threatening society. When individual rights clash with majoritarian values or governmental power, many Americans automatically respond by seeking redress in the courts.” John P. Sahl, *Secret Discipline in the Federal Courts — Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 196-97 (1994).

This belief is evident in the respective codes of conduct currently used to regulate lawyers and judges.

II. REGULATION OF LAWYERS: AN OVERVIEW

The regulation of lawyers by the use of ethical standards, as well as other types of regulations, is state-based.²⁹ Since 1986 however, some uniformity has existed due to the promulgation of the *Standards for Imposing Lawyer Sanctions* published by the ABA Joint Committee on Professional Sanctions.³⁰ These Standards are a model for disciplinary bodies to look to in imposing sanctions for misconduct.³¹ In 1993, the ABA issued the *Model Rules for Lawyer Disciplinary Enforcement*, which provide an overview of the proper structure for a lawyer regulation system and the proper procedure for disciplinary proceedings.³² In most states, the highest court has the responsibility for the discipline of lawyers licensed in those jurisdictions, and many have closely followed these guidelines.³³ The highest court generally delegates the authority to the state bar, a disciplinary board, or a board of professional responsibility retaining final review power.³⁴ Most states use a statewide disciplinary system, which provides consistency in the process and substance of sanctions.³⁵ Most states also follow the ABA recommendations for judicially controlled attorney disciplinary systems with only minor variations.³⁶

Systems for disciplining lawyers generally include an office of disciplinary counsel, a hearing panel, a statewide review board, and final review by the state's highest court. Initially, the office of disciplinary counsel evaluates the complaint to determine whether it is a matter within the jurisdiction of the lawyer discipline system.³⁷ This office then investigates further if appropriate, and either dismisses the complaint or files formal charges against the lawyer in question.³⁸ If

29. See DEBORAH L. RHODE AND DAVID LUBAN, *LEGAL ETHICS* 129 (Foundation Press 1995).

30. See generally ABA JOINT COMMITTEE ON PROFESSIONAL SANCTIONS, *STANDARDS FOR IMPOSING LAWYER SANCTIONS* (1986).

31. *Id.*

32. See AMERICAN BAR ASSOCIATION : BUREAU OF NATIONAL AFFAIRS, *MISCONDUCT AND DISCIPLINE, LAWYERS MANUAL ON PROFESSIONAL CONDUCT* § 101:2003-2007 (Jan. 26, 1994) (recounting the most used lawyer discipline systems) [hereinafter *MISCONDUCT AND DISCIPLINE*].

33. *Id.* at § 101:2004; see also ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, *SURVEY OF LAWYER DISCIPLINARY PROCEDURES IN THE UNITED STATES* (1984) [hereinafter 1984 ABA SURVEY].

34. *MISCONDUCT AND DISCIPLINE* at § 101:2004. See also CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 3.1, at 79 (1986) [hereinafter *WOLFRAM, MODERN LEGAL ETHICS*]; 1984 ABA SURVEY (indicating that 1984 Statistics reveal that 36 states had such a structure).

35. See *WOLFRAM, MODERN LEGAL ETHICS* § 3.2, at 84.; see also 1984 ABA SURVEY at 1 (finding in 1984 that 46 states had implemented statewide disciplinary agencies).

36. See *MISCONDUCT AND DISCIPLINE*, *supra* note 33, at § 101:2004 (stating that in almost all states, the highest court has the responsibility for the lawyers licensed within that jurisdiction).

37. *Id.* at § 101:2004.

38. *Id.*

necessary, the panel or committee hears the case and gives a report on the proceedings. Depending on the available resources, hearing panels perform varying levels of hearings.³⁹ Then, a statewide disciplinary board reviews the report of the panel or committee and either recommends sanctions or dismisses the case. Finally, the case may go before the state's highest court, which wields ultimate decision-making power in lawyer discipline cases. The highest court may follow the board's disciplinary recommendations or may impose more severe sanctions such as a long-term suspension or disbarment.⁴⁰ Although most disciplinary counsel offices do not issue advisory opinions on the ethics rules,⁴¹ many states now have an ethics committee to assist and advise practitioners through non-binding reports.⁴²

III. JUDICIAL REGULATION: AN OVERVIEW

The regulation of judges is similarly state-based. As the *Code of Judicial Conduct* states:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.⁴³

When this canon is violated, public confidence in the judiciary is diminished, doing injury to our system of government under law.⁴⁴ Formerly, to restore confidence in the judiciary, public measures such as impeachment, recall, and address were used to censure judges.⁴⁵ Impeachment occurs when a legislature removes a judge from public office.⁴⁶ Recall is a method by which the electorate can vote to remove a judge.⁴⁷ Address requires that the legislature ask the governor to remove a judge.⁴⁸ These methods proved costly, cumbersome, and were so rarely used that when they were applied it was often viewed as a personal

39. *Id.* at § 101:2004-2005.

40. *Id.* at § 101:2004.

41. *Id.* at § 101:2005.

42. *Id.*

43. JUDICIAL CODE Canon 1.

44. JUDICIAL CODE Canon 1, cmt.

45. See WILLIAM T. BRAITHWAITE, WHO JUDGES THE JUDGES?: A STUDY OF THE PROCEDURES FOR REMOVAL AND RETIREMENT 12 (1971).

46. *Id.*

47. *Id.*

48. *Id.*

attack on the judge.⁴⁹ In response to the inefficiencies inherent in such political remedies, state governments have developed informal, self-regulating methods of supervising judges similar to the methods used for lawyers.

To fill the need for judicial supervision, judicial discipline organizations were created in all fifty states, the District of Columbia, and the federal judicial system.⁵⁰ Judicial conduct organizations serve a three-fold purpose. First, they enforce the *Code of Judicial Conduct*. Second, they attempt to maintain public confidence in the judiciary. Third, they work to protect judges from frivolous and unwarranted allegations.⁵¹ These organizations review and supervise judicial behavior and reprimand errant judges, not as punishment, but to protect the public from unfit judges.⁵² As the ABA has explained, “[T]he major purpose of judicial discipline is not to punish judges, but to protect the public, preserve the integrity of the judicial process, maintain public confidence in the judiciary, and create a greater awareness of proper judicial behavior on the part of judges themselves.”⁵³ The Supreme Court of New Jersey has summed up the rationale of judicial discipline as follows:

The single overriding rationale behind our system of judicial discipline is the preservation of public confidence in the integrity and the independence of the judiciary This Court cannot allow the integrity of the judicial process to be compromised in any way by a member of either the Bench or the Bar. Accordingly, institutional concerns figure prominently in cases involving judicial discipline Consonant with those institutional concerns, the determination of sanctions in judicial-discipline cases is not so much to punish the offending judge as to restore and maintain the dignity and honor of the position and to protect the public from future excesses.⁵⁴

Given this over-arching principle upon which the foundation of judicial discipline is laid, courts have developed a three-pronged attack launched through disciplinary measures: announce, deter, and discourage. The discipline imposed must be designed to announce publicly the system’s recognition of misconduct, it must be sufficient to deter one who is lured toward misconduct from engaging in such conduct, and it must be an appropriate way to discourage others from

49. *First Amendment Coalition v. Judicial Inquiry & Rev. Bd.*, 784 F.2d 467, 470 (3d Cir. 1986) (examining Pennsylvania’s creation of an independent judicial review board due to the “dissatisfaction with the cumbersome method of impeachment as the sole procedure for grappling with the problems of the aged, infirm, irascible, or, in rare instances, corrupt judges”).

50. BRIAN R. PITNEY, Note, *Unlocking the Chamber Doors: Limiting Confidentiality in Proceedings Before the Virginia Judicial Inquiry and Review Commission*, 26 U. RICH. L. REV. 367, 368 (1992) (observing that all fifty states, the federal government, and the District of Columbia have judicial conduct commissions).

51. *Id.* at 368.

52. See *In re Duckman*, 699 N.E.2d 872 (N.Y. 1998); CAL. CONST. Art. 6, § 18(c)(2) (2000).

53. ABA STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT, 2 (Tentative Draft, 1977).

54. *In re Seaman*, 627 A.2d 106, 121 (N.J. 1993) (citations and internal quotations omitted).

engaging in similar conduct in the future.⁵⁵ To this end, public announcement, deterrence, and discouragement in effect triangulate the position of disciplinary procedures and sanctions properly aimed at the unique role of a judge.

The standard for judicial behavior is clearly and intentionally higher than the standard for attorney behavior.⁵⁶ “Judges should be held to even stricter ethical standards [than lawyers] because in the nature of things even more rectitude and uprightness is expected of them.”⁵⁷ The expectation is reflected in society’s tendency to equate fair, impartial judges with justice.⁵⁸ Many state courts have stated clearly that they intend to hold judges to a high standard, on and off the bench. For example, Ohio courts explained, “[i]mproper conduct which may be overlooked when committed by the ordinary person, or even a lawyer, cannot be overlooked when committed by a judge.”⁵⁹ Many jurisdictions have scrutinized the imposition this heightened burden of ethical behavior places on judges, and have nevertheless held that any restriction on the judge is outweighed by the need for an ethical judiciary.⁶⁰ The Massachusetts Supreme Judicial Court explained its belief that although “a judge is entitled to lead his own private life free from unwarranted intrusion,” because he is subject to constant public scrutiny, “he must adhere to standards of probity and propriety higher than those deemed acceptable for others.”⁶¹ The court discounted any sense of unfairness regarding this high burden, stating, “More is expected of him and, since he is a judge, rightfully so. A judge should weigh this before he accepts his office.”⁶² Some jurisdictions, even when strongly supporting the need for an ethical judiciary, have strongly cautioned that assuming the mantle of the judiciary subjects one to great scrutiny of both public and private behavior.⁶³ Thus, “[f]rom the time he is clothed with judicial authority he is a marked man The judiciary is the capstone of our democracy but it will be so no longer than its deportment

55. *State ex rel. Comm. on Judicial Qualifications v. Empson*, 562 N.W.2d 817, 832 (Neb. 1997) (“Thus, we discipline a judge not for purposes of vengeance or retribution, but to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society.”) (citations and internal quotations omitted); *see also In re Barr*, 13 S.W.3d 525, 532-33 (Tex. Rev. Trib. 1998) (stating “[T]he ultimate standard for judicial conduct . . . must be conduct which constantly reaffirms one’s fitness for the high responsibilities of judicial office and which continuously maintains, if not furthers, the belief that an independent judiciary exists to protect the citizen from both government overreaching and individual self-help.”).

56. “A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.” JUDICIAL CODE Canon 2(A), cmt. 1.

57. *In re LaMotte*, 341 So. 2d 513, 517 (Fla. 1977).

58. *See Sahl, supra* note 28 and accompanying text.

59. *Cincinnati Bar Ass’n v. Heitzler*, 291 N.E.2d 477, 482 (Ohio 1972), *cert. denied* 411 U.S. 967 (1973).

60. *See In re Pagliughi*, 189 A.2d 218, 221 (N.J. 1963) (“Once a lawyer becomes a judge, his activities are restricted in great part.”).

61. *In re Troy*, 306 N.E.2d 203, 235 (Mass. 1973).

62. *Id.*

63. *See Cone v. Cone*, 68 So.2d 886, 888 (Fla. 1953).

warrants The judiciary is in fact no place for the exhibitionist, one who has not matured emotionally or one who cannot restrain his passions.”⁶⁴ This higher expectation of judges can be a source of concern when organizations created to discipline judges seek to investigate the conduct of lawyers seeking a judgeship, when as lawyers, they are used to a less invasive swath of regulations.

IV. ROLE-BASED ETHICS WHEN SWITCHING ROLES

When lawyers commit professional misconduct and then later are appointed or elected to the bench, an issue arises over who may discipline them. This simple question is a morass of legal and ethical dilemmas. On the one hand, the bad actor was a lawyer when the misconduct took place and should therefore be subject to censure by the lawyer discipline system. However, this gives a panel designed for dealing with lawyer misconduct jurisdiction over sitting judges. Alternatively, because the person is currently a sitting judge, he should be subject to the reprimand of the appropriate judicial commission. However, it is questionable whether a judicial commission should invade the province of the attorney in punishing the acts of lawyers.

The key problems presented are two-fold. First, a jurisdictional dilemma occurs unless the state constitution or a state statute is written to clarify who may discipline whom.⁶⁵ Most states provide that judges can only be censured by the proscribed judicial commission under the authority of the state’s highest court or by one of the older methods of discipline (impeachment, recall, or address) if they are left in place.⁶⁶ This would seem to place judges beyond the pale of lawyer discipline for their acts as lawyers.⁶⁷ This basic issue is one that can lead to dismissal of otherwise genuine cases of misconduct.⁶⁸

A second problem presented when a disciplinary body reaches out to punish behavior not typically within its jurisdiction is a choice of law-type problem. This occurs because the lawyer disciplinary system is not set up to punish violations of the *Judicial Code*, and the judicial commission is not set up to punish violations of the *Model Rules of Professional Conduct*.⁶⁹ Many jurisdictions have not yet provided any means by which disciplinary bodies can resolve this conundrum. In

64. *Id.*

65. *See State ex rel. Nebraska State Bar Ass’n v. Krepela*, 610 N.W.2d 1, 3-4 (Neb. 2000) (examining as a threshold matter what body has jurisdiction).

66. *Id.*; *see also supra* notes 45-50 and accompanying text.

67. *In re Honorable Don E. Burrell, Jr.*, 6 S.W.3d 869, 870 (Mo. 1999).

68. *See Blackwell v. Bayles*, 366 N.W.2d 13, 14 (Mich. App. 1984) (stating “[t]he court rules indicate that the Supreme Court and the Judicial Tenure Commission have the exclusive jurisdiction to consider this type of case The preliminary injunctions and temporary restraining order are, therefore, dissolved.”).

69. Courts are more than willing to note this distinction. *See, e.g., Oklahoma Bar Ass’n v. Sullivan*, 596 P.2d 864 (Okla. 1979) (approving of Trial Authority’s refusal to accept Bar Association’s position that attorney misconduct of a then-seated judge was conclusively established by an earlier proceeding finding the judge guilty of violating the *Code of Judicial Conduct*).

some jurisdictions, however, the grant of authority to judicial disciplinary bodies includes an express grant to discipline judges for actions that occurred prior to taking the bench.⁷⁰ Generally, this extension of jurisdiction applies in one of two ways. First, the judicial commission may be empowered to discipline judges for their actions in campaigning for the judicial position.⁷¹ Second, the judicial commission may be empowered to discipline for conduct that constitutes misconduct in office, conduct that is clearly prejudicial to the administration of justice, or another ground of discipline listed in the state constitution.⁷²

In the absence of an extension of jurisdiction and some direction as to the extension of the substantive aspects of the disciplinary system, states are left with a gap in their overall scheme of discipline within the legal system. This gap created by these dual disciplinary systems primarily occurs when lawyers commit some questionable act just prior to taking the judgeship. State courts asked to resolve this issue in the absence of clear constitutional or statutory rules have, in recent decisions, come out on both sides of this debate.⁷³ States like Nebraska have decided that sitting judges are beyond the reach of lawyer disciplinary proceedings.⁷⁴ Other states, such as Missouri, have decided that conduct prior to a judge's taking the bench falls outside the jurisdiction of the judicial committee and that such misconduct should be punished by the lawyer disciplinary system.⁷⁵

A. THE JUDICIAL CANDIDATE

A person becomes a candidate for judicial office the moment she makes a public announcement of the candidacy, files as a candidate with the election or appointment authority, authorizes others to garner support, or accepts support or contributions.⁷⁶ Methods of choosing judges vary from jurisdiction to jurisdic-

70. See *infra* notes 72-73.

71. See *In re Miller*, 759 A.2d 455, 458 (Pa. Jud. Disc. 2000) (stating that a judge who seeks re-election can be disciplined by the judicial discipline system regardless of his success in the election, but an attorney candidate would be disciplined in the attorney system if he lost and in the judicial system if he won the election.).

72. See MICHIGAN COURT RULE 9.205. See also *In re Gillard*, 271 N.W.2d 785 (Minn. 1978) (upholding the removal of a judge for acts of professional misconduct that occurred while he was acting as an attorney); *In re Ryman*, 232 N.W.2d 178, 180 (Mich. 1975) (“[m]isconduct, although unrelated to the performance of judicial duties, and even if occurring before the lawyer becomes a judge, may be ‘conduct that is clearly prejudicial to the administration of justice’ ”); *In re Greenberg*, 280 A.2d 370 (Pa. 1971) (mail fraud was grounds for removal from the bench even though the fraudulent acts were committed before becoming a judge); *In re Sarisohn*, 233 N.E.2d 276, 281 (N.Y. 1967) (judicial discipline is warranted by misconduct occurring before becoming a judge that would justify debarment from future office or which relates to general character and fitness for office).

73. Compare *State ex rel. Nebraska State Bar Ass’n v. Krepela*, 610 N.W.2d 1 (Neb., 2000) with *In re Honorable Don E. Burrell, Jr.*, 6 S.W.3d 869 (Mo. 1999).

74. See *State ex rel. Nebraska State Bar Ass’n v. Krepela*, 610 N.W.2d 1 (Neb. 2000).

75. See *In re Honorable Don E. Burrell, Jr.*, 6 S.W.3d 869 (Mo. 1999).

76. See JUDICIAL CODE Terminology (defining “candidate”).

tion, sometimes varying within one jurisdiction, and can consist of appointment by executive or legislative branches, appointment based on merit selection, nonpartisan election, and partisan election.⁷⁷ A public campaign for a judicial position impacts the light in which the public views judicial officers in three ways. First, after a candidate is elected based on promises to the electoral body, she may feel the obligation to make good on those promises once seated on the bench.⁷⁸ A mirror image of that concern is the potential for vindicating certain attacks on a judge's record or tendencies launched by an unsuccessful opponent.⁷⁹ Second, a judge who wishes to run for re-election at the end of her term may be driven to arrive at decisions that will look favorably in future campaign ads, or at the very least avoid decisions that would provide a prospective challenger with ammunition.⁸⁰ Finally, and most importantly in light of the role of a judiciary, the public may come to perceive that the judges will act in furtherance of their campaigns, rather than in regard to proper legal processes that hold litigant's rights as paramount.⁸¹ In light of the importance of maintaining the integrity of the judiciary even as cut-throat competition ensues to obtain such a distinguished position, both the *Code of Judicial Conduct* and the *Model Rules* demand that a candidate conduct herself with the utmost respect for the office.⁸²

A successful candidate who has been transformed from a lawyer or even a layperson into a judicial officer is held responsible under *Judicial Codes of Conduct* for her successful campaign.⁸³ In *In re Judge Roy Cascio*, the Louisiana Supreme Court, acting upon the recommendation of the Judiciary Commission of Louisiana, censured a successful judicial candidate for falsely claiming in his

77. See JUDICIAL CODE Canon 5, n.5.

78. See *In re Bybee*, 716 N.E.2d 957, 960 (Ind. 1999) (citing *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1997)).

79. See *id.*

80. See *id.* (citing *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993)).

81. *Id.* (citing *Stretton v. Disciplinary Bd. Of the Supreme Ct. of Pa.*, 944 F.2d 147, 144 (3d Cir. 1991)).

82. JUDICIAL CODE Canon 5 outlines a series of complicated hurdles designed to ensure a candidacy that does not result in the appointment or election of a judicial officer with favors to return and does not impugn that officer's tenure. MODEL RULE 8.2(b) refers the attorney who is also a judicial candidate to the JUDICIAL CODE for guidance.

83. In fact, some jurisdictions go so far as to require a judicial candidate to undergo mandatory training in proper judicial campaign conduct. *Ohio State Code of Judicial Conduct* Canon 7(B)(5) states, "No earlier than one year prior to and no later than thirty days after certification of his or her candidacy by the election authority, a judicial candidate shall complete a two-hour course in campaign practices, finance, and ethics accredited by the Commission on Continuing Legal Education. Within five days of completing the course, the judicial candidate shall certify to the Board of Commissioners on Grievances and Discipline his or her completion of the course and understanding of the requirements of the *Code of Judicial Conduct* and applicable provisions of the *Revised Code*." OHIO REV. CODE ANN. Jud. Canon 7(B)(5) (Anderson 2000). The court in *In re Judicial Complaint of Hein*, 706 N.E.2d 34 (Ohio 1999), held a prosecuting attorney liable for his improper judicial campaign statements about his opponent despite his lack of knowledge defense based on the requirement of familiarity with campaign rules imposed by Canon 7(B)(5).

campaign literature that he was an incumbent.⁸⁴ Of course, a genuine incumbent candidate for judicial office, by definition, would already be subject to the full force of codes of judicial conduct in which the candidacy rules lie. However, as the court in *In re Tennant* points out, the rules regarding a judicial candidacy apply to all candidates, whether they are incumbent judges or lawyers seeking their first judicial office.⁸⁵ Although the Judicial Investigation Commission's complaint erroneously asserted that Tennant was currently serving as a magistrate judge during his campaign, and therefore subject to the judicial codes, the court noted that Canon 5⁸⁶ "generally applies to all incumbent judges and judicial candidates. A candidate, whether or not an incumbent, and *whether or not successful*, is subject to judicial discipline for his or her campaign conduct."⁸⁷ Even a person not already subject to a judicial code whose candidacy fails to result in her election stands under that umbrella of the judicial code upon becoming a candidate.⁸⁸ Regardless of the roles of a lawyer or a judge, the nature of the judiciary is such that both must be controlled under a judicial code to maintain its proper functioning and all-important credibility in the public eye. Once the judge is seated, the dilemma focuses on which disciplinary body shall be responsible for examining grievances and recommending sanctions.

B. PRIOR ACTS OF SITTING JUDGES PUNISHABLE ONLY BY JUDICIAL BODY

The issue presented in these cases caught in the gap between judicial and lawyer disciplinary bodies is whether the ABA-created lawyer disciplinary body may institute or prosecute charges against a sitting member of the judiciary for prior conduct as a lawyer. Recently, the Supreme Court of Nebraska spoke on this very issue, holding that the lawyer disciplinary body could not initiate proceed-

84. *In re Cascio*, 683 So. 2d 1202 (La. 1996). Ironically, when previously serving as an ad hoc judge on a few occasions, Judge Cascio was required and did sign a statement that said, in part, "I will not use the title of judge or use any photograph in a judicial robe in any campaign for elective office, or use any other advertising that may mislead the public into believing that I am or have been elected to a judicial office." *Id.* at 1202-03.

85. *In re Tennant*, 516 S.E.2d 496 (W. Va. 1999) (holding that judicial candidate's personal solicitation of campaign contributions warranted admonishment, even though candidate was not an incumbent judge).

86. *Id.* Canon 5 of the *West Virginia Code of Judicial Conduct* is analogous to Canon 5 of the *ABA Code of Judicial Conduct* controlling campaigns.

87. *Id.* at 498 n.2 (emphasis added).

88. Case after case holds unsuccessful candidates who have never been judges accountable under judicial codes for improper campaign tactics. *See, e.g., In re Bybee*, *supra* note 78. Eliciting the vote of the same persons over which a potential judge would preside presents such a potential for mischief that it is fundamental to the interests of the judicial branch to guard against such conduct by all means necessary. *See supra* notes 84-89 and accompanying text. Even MODEL RULE 8.2(b) recognizes the importance of attorneys obeying the ethical guidelines of judicial campaigns despite the differing roles of the professions. In fact, the same concerns of potential future litigants under a presiding judge bear on the success or failure of individual attorneys who may either reap the benefits of political capital sown with successful candidates or face the wrath of the successful opponent not supported by an attorney appearing before him or her on behalf of a litigant.

ings against a sitting judge.⁸⁹ This denial of jurisdiction of the ABA over prior acts of a lawyer when investigated during that lawyer's tenure as a sitting judge rests on two arguments: 1) structural and public policy reasons favor disallowing lawyers to have jurisdiction over those under whom they serve; and 2) the judicial disciplinary committee is adequately equipped to deal properly with past acts of a lawyer if it is granted the right to examine pre-bench acts which might harm the judiciary.

1. LAWYER DISCIPLINARY BODIES AND SITTING JUDGES

Structural arguments as well as public policy militate against allowing lawyer disciplinary bodies to discipline judges. States like Nebraska reason that their state constitutions and statutes treat judges and lawyers differently.⁹⁰ This opinion is supported by the very role-based nature of the two different disciplinary systems, as seen in the varied levels of attention in the two codes directed toward ethical behavior outside the official duties of the roles.⁹¹ Oklahoma reached a similar result in principle in finding that the Oklahoma Bar Association could not discipline a sitting judge.⁹² In *Chambers*, the bar association claimed that it had authority to proceed against any Oklahoma judge if it deemed that such judge was guilty of misconduct on the bench. The Oklahoma Supreme Court disagreed, reasoning that a sitting judge is technically precluded from practicing law, and is therefore outside the bar association's purview for as long as she holds a judicial position.⁹³ Because all rights and privileges to engage in the practice of law are suspended upon being seated at the bench, role-based lawyer disciplinary procedures, designed to ensure that such rights and privileges are not extended to those unfit to practice law, are not appropriate to discipline judges.⁹⁴ Harkening back to a more traditional approach to judicial discipline, Florida endorsed an argument that couples structural reasons with a constitutional basis to deny the ABA's claim of jurisdiction over pre-bench acts as a lawyer, finding that the ABA's assertion of jurisdiction had "no legitimate objective other than the ultimate removal of petitioner from office, a result intended under our Constitution to be accomplished only by impeachment."⁹⁵ A clear concern created by the possibility of judges being disciplined by a lawyer disciplinary body is that lawyers might hold

89. *Krepela*, 610 N.W.2d 1.

90. *Id.*

91. See *supra* notes 9-24 and accompanying text.

92. See *Chambers v. Central Committee of Oklahoma Bar Ass'n*, 224 P.2d 583 (1950).

93. *Id.*

94. See *In re Proposed Disciplinary Action*, 103 So. 2d 632 (Fla. 1958).

95. *Id.* at 633. However, the addition of another method of discipline, such as through a judicial disciplinary body, presumably would not alter the analysis because that too would provide for removal of a sitting judge by means other than specified in a state's constitution.

power over judges in a manner not intended by the superintending powers of states' legislatures and highest courts and result in the removal of judges in a manner not contemplated by the states' constitutions.⁹⁶ In an Alabama case, the Alabama Supreme Court reasoned that the forum for actions against lawyers was completely separate from that provided by the state constitution for ousting judges, and therefore neither forum could invade the province of the other.⁹⁷

In addition to the major structural reasons for denying the ABA jurisdiction over sitting judges, there exists a major public policy reason concerning the independence of our judicial system. If lawyer disciplinary bodies were permitted to discipline members of the judiciary, the independence of the judiciary would be abrogated, as the Oklahoma Supreme Court explained:

The judges of all our courts must have independence While that independence does not give them the right to indulge in the [unfit] conduct . . . it surely must give them freedom from supervision by the practicing attorneys in their courts and freedom from any requirement that they answer and stand trial before the attorneys, and before the Bar Association The opposite rule and practice contend for, as we have heretofore pointed out, could not accomplish any good, but would result in nothing more than discord, and could result in confusion, pernicious partisan political activity concerning the judiciary, and other results not beneficial to the administration of justice, or desirable in connection with the service to be rendered by the bench and bar.⁹⁸

Alabama's highest court echoed this sentiment, concluding that allowing the bar to discipline judges would expose judges to an inappropriate review by attorneys because:

[it] would be an act removing a constitutional armor, we think properly placed, around a judge so that he may remain free to function without fear or favor, and without subjecting his actions to discipline by lawyers who may be practicing before him, through the office of the State Bar Association, regardless of how honorable the motives of the would-be prosecutors may be.⁹⁹

In many jurisdictions, therefore, the lawyer disciplinary body may not discipline a sitting judge, even for acts of a non-judicial nature which took place prior to the individual's taking the bench. When a member of the judiciary assumes the bench, she is prohibited from practicing law, and this suspension of the practice also suspends the applications of the lawyer disciplinary system to

96. See *Krepela*, 610 N.W.2d at 402. See also *In re Jones*, 12 So. 2d 795 (La. 1943) (stating that to allow disbarment of judge solely on the basis of loss of right to practice, would allow for the removal of judges by the bar which could revoke a judge's license and thereby do indirectly that which cannot be done directly).

97. See *Alabama State Bar ex rel. Steiner v. Moore*, 213 So.2d 404 (Ala. 1968).

98. *Chambers*, 224 P.2d at 586.

99. *Moore*, 213 So. 2d at 408.

the judge.¹⁰⁰ Additionally, states, in creating these systems, sought to avoid subjecting judges to review by lawyers or otherwise breaching the independence of the judiciary.

2. JUDICIAL DISCIPLINARY BODIES CAN PUNISH FOR ACTS COMMITTED PRIOR TO TAKING THE BENCH

Unless jurisdiction was vested in the judicial disciplinary body, denying lawyer disciplinary bodies jurisdiction over prior acts of a sitting judge would leave acts committed by lawyers prior to taking the bench essentially unregulable. In order to provide the necessary mechanism by which to avoid the embarrassment of allowing unethical pre-bench behavior to go unscrutinized and therefore implicitly endorsed, states often rely on constitutional provisions and other language to support the jurisdiction of judicial discipline committees.¹⁰¹ Nebraska's constitution provides that a judge may be disciplined for any conduct prejudicial to the administration of justice that brings the judicial office into disrepute, including actions of the judge that occurred prior to the time the judge took office.¹⁰² The court in *Krepela* defended its finding of exclusive jurisdiction of the judicial disciplinary body as consistent with the overall system of discipline for judges and lawyers, explaining that the ABA had itself recommended that a commission on judicial conduct be created with jurisdiction over allegations of misconduct that had occurred before service as a judge.¹⁰³ The Supreme Court of Florida also has consistently ruled that pre-judicial conduct may be used as a basis for removal or reprimand of a judge by the judicial disciplinary body, because the state constitution includes a similar grant of authority to investigate pre-judicial acts and recommend to the state's high court the removal (for unfitness) or reprimand (for misconduct) of a sitting judge: "[t]he language of section 12 [Fla. Const. Art. V, § 12(a)] is unambiguous on its face and we conclude that it means just what it says: The Commission may investigate and recommend the removal or reprimand of any judge whose conduct in or outside of office warrants such action."¹⁰⁴

Even absent explicit constitutional grants of jurisdiction as found in the

100. See JUDICIAL CODE Canon 4(G).

101. In *Krepela*, the Nebraska Supreme Court held that the judicial disciplinary body could properly punish a judge for the judge's acts prior to taking the bench, finding support in the state constitution, which provides the judicial disciplinary body with the authority to consider the acts of a judge that occurred prior to the judge's assuming the bench. *Krepela*, 610 N.W.2d at 5-6.

102. *Id.* at 8.

103. *Krepela*, 610 N.W.2d at 5. See also AMERICAN BAR ASSOCIATION'S MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT § I, Rule 2B(1) (1994).

104. See *In re Davey*, 645 So. 2d 398, 403 (Fla. 1994) (The court cites a number of cases for this proposition.) See also *In re Meyerson*, 581 So. 2d 581 (Fla. 1991); *In re Capua*, 561 So. 2d 574 (Fla. 1990); *In re Carnesoltas*, 563 So. 2d 83 (Fla. 1990); *In re Berkowitz*, 522 So. 2d 843 (Fla. 1988); *In re Sturgis*, 529 So. 2d 281 (Fla. 1988); *In re Byrd*, 511 So. 2d 958 (Fla. 1987); *In re Speiser*, 445 So. 2d 343 (Fla. 1984).

Nebraska and Florida constitutions, most states have at least some language which would allow the judicial commission broad discretion to examine past behavior that is prejudicial to the administration of justice or brings the judicial office into disrepute. For example, in a triad of cases decided throughout the 1970s, Michigan found and affirmed the jurisdiction of judicial disciplinary bodies over “conduct as a practicing lawyer unrelated to judicial duties, [because] such non-judicial conduct might be ‘conduct that is clearly prejudicial to the administration of justice.’ ”¹⁰⁵ Those jurisdictions not granting authority over judges to lawyer disciplinary bodies are quick to find basis for authority of the judicial bodies to self-regulate.

C. PRIOR ACTS OF SITTING JUDGES PUNISHABLE ONLY BY LAWYER DISCIPLINARY BODY

Cases presenting this jurisdictional dilemma as to which disciplinary body has the authority to investigate judges for their conduct as lawyers have not uniformly been decided in favor of the judicial disciplinary body. On the issue of who has the authority to bring disciplinary proceedings against a judge, some states such as Missouri have decided that the lawyer disciplinary bodies are appropriate for punishing behavior committed as a lawyer regardless of that lawyer’s present status as a judge.¹⁰⁶ The support for this choice rests on two arguments. First, the explicit jurisdictional grant of the judicial disciplinary body simply does not extend to acts committed by someone who is not a judge at the time he or she engages in the behavior. Second, any unethical acts by a lawyer are appropriately and adequately within the scope of the *Model Rules of Professional Conduct* and punishable by the lawyer disciplinary system regardless of the perpetrator’s occupational status when disciplinary actions are finally initiated.

1. STRUCTURAL DENIAL OF JUDICIAL DISCIPLINARY BODIES’ JURISDICTION

The primary argument for keeping the right to scrutinize and administer sanctions for a lawyer’s actions with the lawyer disciplinary bodies, even if the former lawyer is a judge at the time discipline is contemplated, is structural. The very use of a dual system of discipline, geared towards different role-based goals, which subject individuals to different duties depending on their function within the entire judicial scheme, supports this narrow reading. It may be inappropriate for judicial bodies to discipline lawyers with their use of expansive inquiries and expectations of off-bench behavior because lawyers serve a much different role

105. *In re Kapcia*, 205 N.W.2d 436, 440 (Mich. 1973) (citing MICHIGAN COURT RULE 9.205(E)). *See also In re Ryman*, 232 N.W.2d 178 (Mich. 1975); *State Bar Grievance Administrator v. Moes*, 205 N.W.2d 428 (Mich. 1973).

106. *See In Re Burrell*, 6 S.W.3d at 870 (holding that the judicial disciplinary body could not reach attorney misbehavior merely because the attorney had become a judge).

within the entire judicial system.¹⁰⁷

Many courts that deny judicial commissions any authority over previous acts of lawyers rely on strict readings of their state constitutions. For example, the Missouri constitution states in part that “[t]he [judicial] commission shall receive and investigate all requests and suggestions for retirement for disability, and all complaints concerning misconduct of all judges, members of the judicial commissions, and of this commission.”¹⁰⁸ Recently, the Missouri Supreme Court read this subsection to grant the judicial commission authority over the misconduct of sitting judges only, therefore denying the Commission any authority over misconduct by lawyers before they become judges.¹⁰⁹ Moreover, the court viewed nothing in the constitution to give judicial disciplinary bodies any sort of pendent jurisdiction over the misconduct of lawyers merely because they become judges, but instead found that the judge’s alleged misconduct was outside the reach of the judicial disciplinary body because it occurred while she still was a lawyer. Such formalistic analysis without regard to the previously enumerated countervailing concerns also results in finding lawyer disciplinary bodies adequate to discipline judges.

2. LAWYER DISCIPLINARY BODIES CAN PUNISH FOR ACTS COMMITTED PRIOR TO TAKING THE BENCH

Denying the judicial disciplinary bodies jurisdiction would leave acts committed by lawyers prior to taking the bench unregulated and essentially unregulable, unless jurisdiction was found for the lawyer disciplinary body. In *In re Burrell*, the Missouri Supreme Court found that while the judicial body could not take action, the lawyer disciplinary body could properly punish a judge for the judge’s acts prior to taking the bench.¹¹⁰ The court believed that the lawyer disciplinary body could adequately deal with the concerns of the judicial disciplinary body about investigation of a judge for his acts in campaigning for the position of judge under *Model Rule of Professional Conduct* 8.2(b) which states, “A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the *Code of Judicial Conduct*.”¹¹¹ Of course, given the fact that the ABA itself has recommended the formation of a judicial committee to address pre-bench lawyer behavior, this rule does not necessarily indicate the intention that it be enforced by the lawyer disciplinary bodies.¹¹²

107. See *supra* notes 3-29 and accompanying text.

108. MO. CONST. ART V, § 24, §§ 1.

109. See *In re Burrell*, 6 S.W.3d at 870.

110. See *id.*

111. See *id.* (quoting the MODEL RULES Rule 4-8.2(b)).

112. See *supra* note 101.

D. DISCIPLINING FORMER JUDGES

A system that limits the authority of judicial commissions to addressing only those pre-bench acts carried out during a judicial campaign and those acts committed and prosecuted while the judge is sitting, but at the same time denying jurisdiction of a lawyer discipline mechanism because a sitting judge is technically no longer a lawyer, would leave a gaping hole of uncorrectable misconduct. A judge could simply retire, or, if the conduct was complained of too close to end of a term to allow a full disciplinary procedure, promise not to seek another term to avoid sanctions. Under a regime such as this, a judge would have little incentive to watch her step because the threat of removal from the bench, or the stripping away of future livelihood in practicing law again after retiring would be empty. In this regard, courts have indicated that a judge may not retire and be absolved of his wrongdoings by virtue of her voluntary forfeiture of the position.

In *In re Thayer*, a former judge sought to end proceedings against him for allegations of judicial misconduct while on the bench.¹¹³ Thayer argued that upon his resignation, the committee lost jurisdiction over his conduct as a judge and any such case would pass to the Committee on Professional Conduct.¹¹⁴ The court, however, analyzed the jurisdictional dilemma in terms of the purpose of judicial discipline and the role of judges. Since the entire purpose of judicial discipline proceedings is to protect the public, preserve the integrity of the process, maintain public confidence in the judiciary, and create awareness of proper judicial behavior on the part of judges, that purpose is not only served by the removal or suspension of a sitting judge but also by the ability of the judicial commission to hold a public hearing and to levy sanctions other than removal, such as censure.¹¹⁵ “Even after leaving office, an ex-judge retains the status of the judicial office on his resume. The public is entitled to know if the record is tarnished.”¹¹⁶ Further, applying for removal cannot replace judicial removal proceedings because there is a different concern that is implicated in judicial disciplinary actions that is not addressed by other proceedings arising from the judge’s on-bench conduct.¹¹⁷ Though there may be a split of authority on whether a judicial disciplinary body has jurisdiction over a judge who resigns, most hold that jurisdiction continues.¹¹⁸

113. *In re Thayer*, 761 A.2d 1052 (N.H. 2000).

114. *Id.* at 1058-59.

115. *Id.* at 1055.

116. *Id.* at 1060.

117. *Id.* at 1059 (quoting *Matter of Yaccarino*, 502 A.2d 3, 31 (N.J. 1985)).

118. *Id.* at 1059. Indeed, most jurisdictions which hold contrary rest on other principles outlined by their individual specific laws. *See id.* at 1060. *See also In re Fuyat*, 578 A.2d 1387 (R.I. 1990). “The principles recognized in these cases have rested upon absence of jurisdiction and the doctrine of mootness.” *Id.* at 1388. The California courts have also recently addressed the issue. *See Rosasco v. Comm. on Judicial Performance*, 98 Cal. Rptr. 2d 111 (Ct. App. 2000) (concluding that an amendment specifically granting jurisdictional authority

The Florida courts have likened a claim by a retired judge that the bar has no jurisdiction to discipline her for misconduct while she was a judicial officer to a claim “that a lawyer is immune from discipline for the most egregious ethical improprieties, so long as his misconduct disgraced not only the bar but the bench as well.”¹¹⁹ The court reasoned that because actions as a judge bear on a lawyer’s fitness to practice law at all, there can be a basis for discipline as a lawyer.¹²⁰ However, an Oklahoma case raises an interesting concern:

The public policy which renders a judge acting in a judicial capacity in a court proceeding immune from civil liability for damages must apply with equal force to a disciplinary proceeding [by a bar association] if the judiciary is to maintain its independence. In our opinion, an attorney may not be disciplined for acts committed by him in his official capacity as a judge unless such acts involve moral turpitude, of a fraudulent, criminal or dishonest character Lack of legal knowledge, unsound judgment, bias and prejudice, oppression or erroneous exercise of judicial discretion on the part of a judge in his official acts constitute no grounds for disciplinary action against him as an attorney.¹²¹

This “independence of the judiciary” rationale, however, is easily rebutted. First, it does not address several primary concerns of judicial discipline: to protect the public; preserve the integrity of the process; maintain public confidence in the judiciary; and create awareness of proper judicial behavior on the part of judges.¹²² Second, although it is important for a judicial officer to make decisions without worrying about liability:

To hold judges exempt from professional misconduct proceedings would deprive members of the public of any remedy. Moreover, to hold that judges may not be sanctioned for actions which exceed their lawful authority would totally disregard the protection of the public, the administration of justice, the maintenance of professional standards, and the deterrence of similar conduct. We discipline a judge to reassure the citizens . . . that the judiciary of their state

over on-the-bench actions of judges after retirement passed in 1995, but was held to not act in retroactive fashion, and thus, a judge who retired in 1993 could not be investigated for his pre-judge conduct or his bench conduct).

119. *Florida Bar v. McCain*, 330 So. 2d 712, 714 (1976). Acknowledging the distinction fomented by the role-based approach to discipline, the Florida Supreme Court relied on an early Wisconsin case, *In re Stolen*, 214 N.W. 379 (1927). In *In re Stolen*, the attorney complained that misconduct in character as a judge had no bearing to the responsibilities and duties as a member of the bar; however, the court reasoned that one’s lack of morality can be exhibited in many ways, so that if a judge shows the lack of moral qualifications required by all attorneys, it is the duty of the court to prune him out of the profession and not allow him to cloak himself in his office to avoid scrutiny by the bar. See 214 N.W. 379 (1927).

120. *McCain*, 330 So.2d at 715.

121. *State ex rel. Oklahoma Bar Ass’n v. Sullivan*, 596 P.2d 864, 869 (1979).

122. See *Mississippi Commission on Judicial Performance v. Russell*, 691 So. 2d 929, 947 (Miss. 1997).

is dedicated to the principle that ours is a government of laws and not of men.¹²³

In light of the overwhelming public interest in holding judges accountable to every extent possible, it seems only reasonable that they should be subject to scrutiny both in the broader sense of that afforded by judicial commissions and in the narrower sense which focuses on their duties as lawyers.

III. NON-LAWYERS AS JUDGES AND MISCELLANEOUS JUDICIAL POSITIONS

It is no excuse that one acting as a judge is not or has never been a lawyer. The *ABA Code of Judicial Conduct* specifically provides in its definition of “judge” that “[a]nyone, *whether or not* a lawyer, who is an officer of a judicial system and who performs judicial functions . . . is a judge within the meaning of this *Code*.”¹²⁴ In this regard, the *Ohio State Code of Judicial Conduct* requires that:

No earlier than one year prior to and no later than thirty days after certification of his or her candidacy by the election authority, a judicial candidate shall complete a two-hour course in campaign practices, finance, and ethics accredited by the Commission on Continuing Legal Education. Within five days of completing the course, the judicial candidate shall certify to the Board of Commissioners on Grievances and Discipline his or her completion of the course and understanding of the requirements of the *Code of Judicial Conduct* and applicable provisions of the *Revised Code*.¹²⁵

This requirement acknowledges that a person has a duty to familiarize herself with the appropriate rules of conduct befitting a judge, regardless of whether or not she is a lawyer. As Judge Jasen points out in his dissenting opinion in *In re Dixon*:

[I]t would be most inappropriate to establish a two-tiered level of professional conduct for Judges: that of the lawyer and the non-lawyer. Upon taking the oath of office, a Judge, whatever his background, has an affirmative obligation to make himself aware of the bounds of proper judicial conduct. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved.¹²⁶

This two-tiered system could not be based on the public interests served by judicial discipline—a litigant cares about integrity of the judicial process first

123. *Id.* at 948 (equating judicial proceedings with bar proceedings in that they both aim to protect the public) (citations and internal quotations omitted).

124. JUDICIAL CODE Application A (emphasis added).

125. See OHIO STATE CODE OF JUDICIAL CONDUCT Canon 7(b)(5), *supra* note 83 and accompanying text.

126. *In re Dixon* 393 N.E.2d 523, 527 (N.Y. 1979) (Jasen, J. dissenting) (citations and internal quotations omitted).

and foremost, not what profession the judge had before deciding the litigant's case.

The ABA *Code of Judicial Conduct* contains specific provisions regarding those individuals not serving as full-time judges.¹²⁷ The definition of judge is tailored to encompass all roles in which an individual performs judicial functions.¹²⁸ The retired judge subject to recall,¹²⁹ continuing part-time judge,¹³⁰ periodic part-time judge,¹³¹ and *pro tempore* part-time judge¹³² all are subject to the *Code*. In *Thomas* the court held that a mayor who sometimes acted as a *pro tempore* judge fell under the definition of "judge" and subsequently held him accountable to the judicial commission.¹³³ The mayor contended that the commission had absolutely no authority against persons outside the judiciary.¹³⁴ However, applying the analogous state code of conduct, he was deemed a "judge" because he had served as a judge, and the court agreed that the commission had jurisdiction.¹³⁵ Furthermore, the court reaffirmed interest in maintaining strict control over even the lowest of courts, stating:

There are good reasons why our justice court judges must regard scrupulously the nature of their office. In the first place, most of our citizens have their primary, if not their only, direct contact with the law through the office of the justice court judge. The perception of justice of most of our citizens is forged out of their experiences with our justice court judges. If these judges do not behave with judicial temperament and perform their duties according to the law and by reference to the process of adjudication, there seems little hope that our citizenry at large may understand and respect the legal process.¹³⁶

CONCLUSION

A role-based view of judicial and lawyer discipline is the key to maintaining a healthy system, especially considering that "[m]any Americans perceive the courts not only as honorable and fair, but also as important guardians of property and person in an increasingly large, diverse, and often threatening society."¹³⁷

127. JUDICIAL CODE Application C-E.

128. Specifically the definition states: "Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this *Code*." *Id.* Application A. As the commentary notes, "The four categories of judicial service in other than full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service." *Id.* Application A, cmt.

129. *Id.* Application B.

130. *Id.* Application C.

131. *Id.* Application D.

132. *Id.* Application E.

133. Mississippi Judicial Performance Commission v. Thomas, 549 So. 2d 962 (Miss. 1989).

134. *Id.* at 964.

135. *Id.*

136. *Id.* at 965-6 (internal citations omitted).

137. Sahl, *supra* note 28 at 196-97 and accompanying text.

Discipline must not be seen as a way of punishing those who have sullied their offices and the system, for that leads to tough jurisdictional questions and puts an accused's judicial peers in the untoward position of passing personal judgment. Rather, the better view looks at the roles of the persons, either as judges or as lawyers, and considers what is best to maintain the public's faith in the system that is oftentimes the dividing line between peace and widespread individual self-help. To this end, regardless of which disciplinary body acts, the trinity of public announcement of misconduct, measures to deter one from repeating an offense and punishment that discourages others from following suit, are all-important in effecting this role-based protection of all aspects of our American judicial system so erminesque in its fragility.